IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971

No.

James Aubrey Langhorne, Petitioner,

v.

May Langhorne, et al., Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondents, Allen F. Langhorne and Beverly Langhorne Kirill, file this brief in opposition to said Petition.

QUESTION PRESENTED

Whether D. Allen Langhorne, the Testator, was compelled by the equal protection clause of the 14th Amendment of the Constitution of the United States, contrary to his expressed intent, to include as a beneficiary under his will a person adopted at the age of 16 years by one of the Testator's sons 43 years after the Testator's death.

FAILURE TO INCLUDE JUDGMENT OR DECREE OF STATE COURT

While the Petition includes the opinion of the Supreme Court of Virginia in the instant case, the judgment or decree of the State Court is not included pursuant to Rule 23, 1.(j).

STATEMENT OF THE CASE

The Statement of the Case by Petitioner is substantially correct. Several portions of the Testator's will are omitted, which additionally confine to his children's "issue" the benefits thereunder; a copy of the entire Article Second of the will is included in the Appendix of this Brief. The Petitioner also failed to include in his Statement that he was adopted at the age of 16 years by W. Devereux Langhorne, a son of the Testator, in 1960, 43 years after the death of the Testator and after W. Devereux Langhorne had been advised, according to the allegations of the Petitioner, that a person adopted by him would share in the Testator's estate. A copy of the adoption decree is included in the Appendix.

It is noted, purely for the purposes of the record, that the

Testator's will was executed in 1914 rather than in 1912.

ARGUMENT

1. The law of Virginia does not discriminate against adopted persons.

Contrary to certain laws of Louisiana, considered in the cases of Levy v. Louisiana, 391 U.S. 68, 20 L Ed 2d 436, 88 S.Ct. 1509 (1968), Glona v. American Etc. Co., 391 U.S. 73, 20 L Ed 2d 441, 88 S.Ct. 1515 (1968), and Labine v. Vincent, 401 U.S. 532, 28 L Ed 288, 91 S.Ct. 1017 (1971), the laws of Virginia do not discriminate against adopted persons who, as indicated by the statutes cited on p. 6 of the Petition, are made to all intents the children of the adoptive parents, and inherit through as well as from them.

(The particular question involved in the Levy case had already been considered and determined in Virginia prior to that decision; and an illegitimate child had been held entitled to benefits under our Wrongful Death Statute. See Carroll v. Snead, 211 Va. 640, 179 S.E. 2d 620 (1971), confirming an earlier holding.)

Since the instant case involves

the interpretation of a will rather than the statutory devolution of property, it should be noted that Chapter 3 of Title of 64.1 of the Code of Virginia, containing Virginia's Statute of Wills (see especially Sec. 64.1-49) contains no restrictions against the inclusion of adopted persons as beneficiaries under a will; and consequently, since there is no discrimination at all, there is no occasion to determine whether our laws meet the more restrictive test of being invidiously discriminatory.

In Virginia, as elsewhere, a testator is free, subject to over-riding restrictive doctrines such as the rule against perpetuities and to the rights of a spouse to take against a will, to leave his property as seems proper to him.

1 Bowe-Parker: Page on Wills, Secs. 2.18, 3.1, 3.11

Wohlford v. Wohlford, 121 Va. 699, 93 S.E. 629 (1917)

Burruss v. Baldwin, 199 Va. 883, 103 S.E. 2d 249 (1958)

Code of Virginia, Secs. 64.1-13, 64.1-16, 64.1-19

A testator may consequently leave his

property to one or more of his children, to some relatives and not others, to some friends and not others, to some charities and not others, pursuant to his own knowledgeable choice. Subject to the restrictive laws mentioned, there is no Virginia law, either statutory or court developed, which requires him to discriminate for or against adopted persons.

2. The Testator did not invidiously discriminate against the Petitioner.

The question in the instant case was not, as might be implied from its phrasing on page 2 of the Petition, whether the Testator was prevented from benefiting a 16-year old child adopted 43 years after his death by one of his sons; it was, rather, whether the will of the Testator, interpreted as of the time it was written and spoke, contained any provision for such an adopted child.

The applicable Virginia authorities have consistently construed the word "issue", in documents effective both before and after 1914 and 1917, to exclude adopted persons.

Graves on Real Property (1912 ed.), sec. 222 (p. 266)

1 Harrison on Wills & Administration (1927), sec. 201, p. 415

Turner v. Monteiro, 127 Va. 537, 103 S.E. 572 (1920)

Munday v. Munday's Ex-rs, 164 Va. 145, 178 S.E. 917 (1935)

Dickenson v. Buck, 169 Va. 39, 192 S.E. 748 (1937)

Fletcher v. Flanary, 185 Va. 409, 38 S.E. 2d 433 (1946)

Mott v. National Bank of Commerce, 190 Va. 1006, 59 S.E. 2d 97 (1950)

McFadden v. McNorton, 193 Va. 455, 69 S.E. 2d 445 (1952)

Newson v. Scott, 200 Va. 833, 108 S.E. 2d 369 (1959)

Merson v. Wood, 202 Va. 485, 117 S.E. 2d 661 (1961)

These authorities are in line with the majority of jurisdictions.

Anno., 86 ALR 2d 12

Security National Bank & Trust Co. v. Willim, 151 W.Va. 429, 153 S.E. 2d 114 (1967)

Fiduciary Trust Co. v. Sillsbee, 159 Me. 6, 187 A.2d 396 (1963)

Amoskeag Trust Co. v. Preston,
107 N.H. 330, 222 A.2d 158
(1966)

The word "issue" is a narrow word; it is not neutral (as characterized on page 5 of the Petition), but graphic, implying that the child came forth from the parents' bodies; it is even narrower than "descendent", which may include not only issue but those entitled to inherit under a statute of descents and distributions.

In the instant case, the Testator not only used the word "issue" in a jurisdiction which had construed the word to include only those born of the body; the Testator was a stranger to the adoption; the Petitioner was adopted 43 years after the Testator's death by a son who had children of his body; the adopted person was 16 years old at the time of the adoption; and the adoptive parent had been advised before the adoption that the Petitioner would be made a beneficiary under the will. Even minority authorities, including commentators frankly favoring adopted children, would deny that the Testator, under such circumstances, intended the adopted person as a beneficiary.

Wilson v. Johnson, ___ Ky. ___,
389 S.W. 2d 634 (1965)

In Re Estate of Comly, 90 N.J. Super. 498, 218 A.2d 175 (1966)

In Re Hulbert's Estate, 17 A.D. 2d 964, 233 N.Y.S. 2d 814 (1962)

See Halbach, Rights of Adopted Children, 50 Iowa Law Rev. 971, pp. 988-9, 990, 994

Even if this Court would properly be asked to construe the Testator's will and assume the applicability of the 14th Amendment, the conclusion could doubtless be reached that the Testator's classification of the objects of his bounty was without invidious discrimination.

3. Review of wills to determine whether a Testator's selection of beneficiaries was invidiously discriminatory is not required by the 14th Amendment of the U. S. Constitution.

In Labine v. Vincent, supra, the opinion of the majority cited with approval Mager v. Grima, 8 How. 490, 12 L Ed 1168 (1850), and Lyeth v. Hoey, 305 U.S. 188, 83 L Ed 119 (1938), in which latter case the Court said (305 U.S. at p. 193 and 83 L Ed at p. 123):

> "The local law determines the right to make a testamentary disposition of such property and the conditions essential

to the validity of wills, and the State Courts settle their construction."

To repudiate this policy and undertake to review the propriety of testamentary dispositions under the "invidious discrimination" test would not only be inappropriate, but would thrust a heavy work load upon the Courts, as this Petition illustrates.

CONCLUSION

The law of Virginia does not discriminate against adopted persons and did not in this case cause any discrimination against the Petitioner. For a Testator to exclude persons from his testamentary bounty is not invidious discrimination under the 14th Amendment; but even if this Court were to establish the doctrine that wills must be reviewed to determine whether improper discrimination is present under the Amendment, there would be no such discrimination in this Testator's intentionally confining his bounty to natural born grandchildren and in excluding a person adopted at the age of 16 years some 43 years after the Testator's death by one of his children with the purpose of affecting the devolution of the Testator's property contrary to his intentions.

It is therefore urged that the Petitioner for Certiorari be denied.

Respectfully submitted,

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April 27, 1972

CERTIFICATE OF COUNSEL

Three copies of the foregoing brief in opposition were deposited in the U. S. Post Office, with first class postage prepaid, addressed to counsel of record at their respective post office addresses, on April 27, 1972.

Edward S. Graves
Of Counsel

A P P E N D I X

SECOND: I devise and bequeath unto my beloved wife, Effie B. Langhorne, as Executrix and Trustee, and her successors, as hereinafter named and provided for, my entire estate, real, personal and mixed, whatsoever and wheresoever situate, upon the following trusts, limitations and conditions, nevertheless, and no other, that is to say:- to pay out of the net annual income thereof, at such periods as my said Executrix and Trustee shall designate, after deducting all taxes and other necessary charges and expenses for the care and protection of my estate, Ten Thousand ($10,000) Dollars a year to my beloved wife, Effie B. Langhorne, for and during the term of her natural life, and the rest and residue of the net income of my said estate to my children, in such shares, or portions, during the term of their natural lives, as my said Executrix and Trustee shall, in her absolute discretion, deem wise and expedient; and upon the death of any one of my said children to pay such share or portion of the income of my said estate to his, or her, issue then living, as my said Executrix and Trustee shall, in her absolute discretion, deem fit and proper; if no such issue be living, for the use and benefit of the survivor, or survivors of my said children, and to the issue of such of my children as may be dead, per stirpes. Upon the death, or

resignation, of my said wife, to my oldest son then living, Legh R. Page, Esq., of Richmond, Virginia, and the Old Dominion Trust Company, Inc., a corporation having its principal place of business at Richmond, Virginia, as her successor or successors, upon the following trusts, limitations and conditions, nevertheless, and no other, that is to say:- to pay the net annual income thereof, at such periods as my said Executors and Trustees shall designate, after deducting the taxes and all other necessary charges and expenses for the care and protection of my estate, to my said children then living, or the issue of any of my said children who may be dead, in such share, or portions, as my said wife, Effie B. Langhorne, Executrix and Trustee as hereinbefore provided, may have, by deed or will, prescribed, but in the event that my said Executrix and Trustee shall have made no such provision by will or deed, in equal shares during the terms of the natural lives of my said children, respectively; and upon the death of any one of my said children, his, or her, share of the income of my estate to his, or her, issue then living; and if no such issue be then living, for the use and benefit of the survivor, or survivors, of my said children and to the issue of those of my said children who may be dead, for life, per stirpes, and upon the death of any

of my said children, leaving issue, and the youngest of said issue attaining the age of twenty-one years, to pay over absolutely and in fee simple, per stirpes, such share, or portion, of the corpus of my estate as that from which the said issue had prior to the youngest attaining the age of twenty-one years received the income; it being my intention that my said children shall enjoy the income of my estate equally during the terms of their natural lives, respectively, in the event my said wife shall not have made a different division of the said income of my estate as hereinabove provided; if any of my said children shall die, leaving issue, the said issue shall take equally the income which his, her, or their parent would have received had such parent been living; and if any one of my said children shall die without issue, or leaving issue, and such issue shall die before attaining the age of twenty-one years, then the income of the share, or shares, that he, she, or they, would have received shall pass by survivorship for life to the other of my said children, and to the issue of any of my said children who shall then be dead; and, lastly, that whenever any one of my said children shall die, leaving issue surviving him, or her, and the youngest of such issue shall attain the age of twenty-one years, then the share, or shares, of my said estate upon which

his, her, or their, parent's income was derived shall pass absolutely and in fee simple to such issue, so that the issue of any of my said children so dying shall take between them, share and share alike, absolutely and in fee simple, the share in which his, her, or their, parent was entitled to a life interest.

VIRGINIA:

IN THE CIRCUIT COURT OF
NORTHUMBERLAND COUNTY

IN RE: ADOPTION OF JAMES AUBREY FENNELL, and Change of his Name to JAMES AUBREY LANGHORNE

DECREE

This day came William Devereux Langhorne and Christine Thomas Langhorne, by their counsel, praying leave to file their petition, which leave was accordingly granted, and said petition filed.

And it appearing to the Court from said petition, which is duly executed as required by law, that William Devereux Langhorne and Christine Thomas Langhorne are residents of the County of Northumberland, Virginia; that on the _____ day of January, 1944, Christine Thomas Langhorne, who was then Christine Virginia Thomas, was married to Benjamin Edward Fennell in Elkton, Maryland; that there was born of this marriage one son, James Aubrey Fennell, who was born at Brooklyn, Maryland, on the 12th day of September, 1944; that on the 27th day of January, 1950, Christine Thomas Langhorne, then Christine Thomas

Fennell, was granted an absolute divorce from Benjamin Edward Fennell by a decree of the Circuit Court of Dinwiddie County, Virginia, and that she was awarded the exclusive custody and control of said child; that the petitioners were lawfully married on the 4th day of August, 1953; that said William Devereux Langhorne desires to adopt the said child and to have his name changed from James Aubrey Fennell to James Aubrey Langhorne; that said Christine Thomas Langhorne consents thereto as evidenced by her joining in said petition indicating her consent thereto; that the said child, James Aubrey Fennell, consents to the prayer of said petition as evidenced by his written consent duly executed and filed with said petition;

The Court doth ADJUDGE, ORDER and DECREE that the name of James Aubrey Fennell be and the same is hereby changed to James Aubrey Langhorne, and, under the provisions of § 63-351(1), Code of Virginia, 1950, as amended, the Court dispenses with the requirement of the consent of the natural father of said infant, and doth ADJUDGE, ORDER and DECREE that said child shall be to all intents and purposes the child and heir of William Devereux Langhorne, as well as Christine Thomas Langhorne, his mother by birth, and that said infant shall be entitled to all rights and

privileges and subject to all of the obligations of a child born in lawful wedlock to the said petitioners; and, the Court being of opinion that this order is proper and should be made pursuant to §§ 63-356.1, and 63-356.2, Code of Virginia, 1950, as amended, without reference to the Director of Welfare and Institutions, and without probationary period, the said child being over the age of 16 years, having lived continuously with the petitioners more than five years, and having consented, such reference and probationary period are hereby dispensed with. The Clerk shall make report of this proceeding as provided of § 63-359, Code of Virginia, 1950.